

Statement in Support of SB 1141 – December 2, 2014

Submitted by Bruce A. Timmons

Four reasons to support the portion of SB 1141 establishing the Criminal Justice Policy Commission:

1. The predecessor Sentencing (Guidelines) Commission – created by 1994 PA 445 and, unfortunately, repealed by 2002 PA 31 – was never allowed to complete its statutory mission. The guidelines that the Commission recommended were never presumed to be perfect. They were based on available data and some assumptions, like how sentences would be determined under straddle cells. The Commission had two immediate tasks upon enactment of the guidelines – to monitor how the guidelines actually worked in practice and to specifically address how guidelines should apply to probation violations. When the Commission was first defunded and then repealed, neither task occurred. A state Supreme Court decision applied guidelines to probation violations – an accidental consequence of guidelines. That is not what the Commission had intended – and commitments to prison as the result of probation violations account for a significant portion of annual prison commitments.

2. The Sentencing Commission was assigned the task to review and monitor guidelines for new felonies and increased penalties for felonies in the broader context of consistency and proportionality. Since guidelines were enacted, there has been no systematic overview of guidelines for new and increased penalties for felonies. The guideline for every such crime since 1998 has been an ad hoc decision. Early on, guideline bills went to the Judiciary Committees in the House and Senate, so there was some measure of consistency. But for the past decade penalty bills go through various legislative committees and the companion guidelines bill trails along with it with little scrutiny or context. In fact, the real decision-maker in many instances is the LSB drafter (who drafts that bill in good faith using a similar penalty as a guide) – not what one would imagine for setting real sentencing policy for the state.

3. The integrity of sentencing guidelines is at risk without the monitoring envisioned for the Sentencing Commission. No one is doing that. An endless series of ad hoc penalties and guidelines – the crime of the month syndrome of ever increasing penalties – undermines the premise of proportionality and the expressed goal to save incarceration for criminals we have reason to fear (crimes of violence) rather than those we are mad at (true property crimes). [A distinction not to be confused with MDOC's classification system.] For example, guidelines particularly limited the impact of offenses like uttering and publishing with its 14-year maximum by designating a class lower than other 15-year maximum crimes got. The result is a measure of proportionality whereas the maximum was out of line. One should keep in mind that the U.S. Supreme Court in recent years has been on a mission for proportionality in sentencing. The Sentencing Commission was a mechanism of the Legislature to maintain that focus.

4. The Sentencing Commission was also intended to serve as an independent agency responsible to the Legislature to gather and analyze criminal justice data, including sentencing policy. There was a bipartisan effort to create a similar entity over several years before 1994 PA 445 because there was a continuing dissatisfaction with data provided by the Department of Corrections. That independent analysis was an important part of the Commission's charge. Repeal of MCL 769.33 was an incalculable, institutional loss to the Legislature – and one of the reasons we had to turn to a study by CSG.

An observation: Prosecutors (PAAM) opposed renewing the Commission in the past because it thought guidelines were too lenient. MDOC claimed the same guidelines exacerbated prison population pressures. Both in the past have stated opposition because "we could not control it". Ah, precisely. The fact that both sides in this endless debate were about equally unhappy means the system is probably doing what it should and was intended to do. Moreover, the CSG on two occasions has concluded that Michigan is not sending the wrong people to prison and the initial sentences imposed under guidelines are comparable to sentences in other states. Please remember also that Michigan only imposes a prison sentence in 14% of felony convictions at the initial sentencing. Where Michigan is the outlier is time-served for comparable crimes – attributable largely to parole practices. (continued)

While I support re-establishment of the Commission, I have concerns about certain aspects of the structure (not the mission) of the Commission as proposed in SB 1141 [HB 5928]:

A. SB 1141 [HB 5928] calls for the Governor to appoint the Chair from among Criminal Justice Policy Commission members – almost all of whom are representatives of or chosen by stakeholders. I believe the **Chair of the Commission ought to be a public member who is not directly identified with a stakeholder**. That was the case in 1994 PA 445. The Chair was beholden to the Governor, not to any particular stakeholder. If the Governor is limited to stakeholder designees, the Governor's choice of a chair is restricted and may not be the best choice for that role. The original Sentencing Commission had 2 members representing the general public. {See HB 5078: "THE GOVERNOR SHALL DESIGNATE 1 OF THE MEMBERS REPRESENTING THE GENERAL PUBLIC AS COMMISSION CHAIRPERSON.".]

B. I have concerns about most Commission Members being delegates of stakeholders (although that has certainly been the trend in commissions in recent years). That was not the model used in 1994 PA 445, where applicants were sought to meet categories of interest – like law enforcement, victims, criminal defense, and alternatives to incarceration.* The latter model was also used for the Community Corrections Board that is in another bill in this package. SB 1141 [HB 5928] is more like the Michigan Indigent Defense Commission and it took almost a year to get the MIDC appointed, although that delay was not entirely attributable to organizational stakeholders. There is a second concern: SB 1141 [HB 5928] may limit the ability of the new Commission to fully represent this state geographically and demographically. We were able to do that in 1995. Since it is unlikely there will be a change to this membership, it is incumbent upon legislators to monitor this Commission to be sure it serves the larger interest of the state as a whole and not preeminently the interest of select stakeholders.

* Note that under SB 1141 [HB 5928] the Commission, while attached to the Legislative Council, provides for appointment of Commission members by the Governor. The original Sentencing Commission, also under the Legislative Council, had legislative leadership involved in the appointment process along with the Governor. HB 5078 retained that process:

"BY AGREEMENT AND WITH THE GOVERNOR'S CONCURRENCE, THE LEADER OF EACH CAUCUS IN THE SENATE AND THE LEADER OF EACH CAUCUS IN THE HOUSE OF REPRESENTATIVES SHALL APPOINT THE REMAINING [NON-LEGISLATOR] COMMISSION MEMBERS DESCRIBED IN SUBSECTION (1)(C) TO (K) ..."

C. I would advise caution in limiting who may serve on behalf of the Senate or House to members of the Judiciary Committees. In 1995-98, **2 of the 5** active members of the Sentencing Commission were serving on Appropriations, not on Judiciary (as the other 3 were). What is important is finding House Members and Senate Members who are willing and committed to serve as active participants on the Commission. Even now the principal proponent of the proposal is the Chair of House Appropriations. It is also advisable, as SB 1141 [HB 5928] as introduced provides, that legislator members represent both caucuses in both houses – as occurred in 1995-98. [I have heard this concern may be addressed but representation of the 4 quadrants had been dropped.]

Finally, the Commission is empowered and instructed to make recommendations to the Legislature and other officials. The recommendations are not self-effectuating. The Legislature can follow, modify, or disregard any recommendation. Same with any executive or judicial branch agency.

Respectfully,



Bruce A. Timmons